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SEP 5 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 319

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

JOHN H. WHEAT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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Of Counsel.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of The Denver and Rio Grande Western Railroad Company, a corporation, for a Writ of Certiorari to review the judgment of the Supreme Court of Utah entered in the above case on December 5, 1952, respectfully shows:

Opinion Below

The opinion of the Supreme Court of Utah (Tr. 0139) (R. 126) is reported in 250 P. 2d 932. It is not yet reported in the Utah Reports.

Summary and Statement of the Matter Involved

The Supreme Court of the State of Utah affirmed a judgment of the District Court in favor of Respondent and

against Petitioner upon the verdict of the jury in an action brought under the provisions of the Federal Employers' Liability Act.

The accident, in which plaintiff claims he sustained his injuries, occurred at Pueblo, Colorado, in the daytime, on March 11, 1950. At the time of the accident plaintiff was working as a hostler's helper and was taking coal from the center coal pocket. There were no eye witnesses so that the only account of what occurred came from the lips of the plaintiff.

The only equipment directly involved was the coal chute. Plaintiff stated that while he was attempting to lower the chute, the cable on the far side from where he was standing broke or parted at the eyebolt causing the chute to drop suddenly. Plaintiff attempted to lower the chute by jumping approximately ten inches into the air, catching hold of the handle and dangling in mid-air until the cable broke. When this occurred there was a great deal of noise, commotion and dust (Tr. 0043, 0061, 0062) (R. 38, 54, 55). As the chute fell downward, it was caught by the safety chain which supports it in the middle, so that the chute did not fall onto plaintiff or strike him in any way except, he stated, it thrust his right arm into his ribs. As it fell, it forced him to assume a sitting position (Tr.0045,0044,0060) (R.39,40,54).

Immediately after the accident plaintiff testified that he climbed down from the top of the engine unassisted and walked to the roundhouse (Tr. 0021) (R. 18). He remained at work that day and coaled another engine. On this occasion, however, he states that he felt pain in his shoulder and back.

Plaintiff remained at work during the entire month of March and until the first part of April. On April 5th he claims that his back, shoulder and legs hurt him so much that he laid off and reported to his doctor in Pueblo. On the

6th of April, he went to the Salida Hospital (T. 0024, 0025) (R. 21). At the Salida Hospital he was placed on a fracture board. He remained in the hospital for treatment until the 13th of May (Tr. 0025) (R. 21). His treatment at the hospital consisted of heat, traction on his left leg, and massages. After being released from the hospital on the 13th of April, he was treated, on two other occasions, as an out patient.

His treatment from the time he left the hospital until he returned to work at Christmas time in 1950 consisted of hot baths and massages (Tr. 0027) (R. 23). Since returning to his employment, he has worked steadily except for three or four trips when he had to lay off because his back was hurting (Tr. 0033, 0034) (R. 29).

Plaintiff admitted that he had injured his right shoulder or arm in 1939 or 1940 prior to his alleged injury, when he fell into a pit (Tr. 0035) (R. 30). On cross-examination he admitted that this injury to his right arm and shoulder had caused him considerable pain and that he had been given chiropractic adjustments in Pueblo (Tr. 0035) (R. 31). On further cross-examination he admitted being treated in 1941 and again in 1943 for pain in his back and right shoulder. In 1946 he was treated for neuritis in his shoulder and at that time gave a history of pain in his shoulder and arm over a period of five years. In all, plaintiff admitted that from 1941 to the time he filed suit he had seen nineteen doctors and chiropractors and three therapeutists. The therapeutists operate a bath and colonic clinic in Pueblo (Tr. 0036-0042) (R. 31-37).

Plaintiff's subjective symptoms of pain, tenderness and limitation of motion were not in any way supported or corroborated by any objective symptoms observed by any of the doctors who testified. The plaintiff called as his sole medical witness an orthopedic surgeon practicing in Salt

Lake City. This doctor saw the plaintiff on two occasions. From X-ray negatives and physical examination he testified that he detected a mild osteoarthritic condition in plaintiff's dorsal spine, which condition was normal for persons of plaintiff's age. This condition was not traumatic in origin or development. The doctor also found an anomaly in the last lumbar vertebra which was congenital in origin and which, in his opinion, would not cause pain. His neurological examination of plaintiff was negative in every essential respect. All reflexes and sensory demonstration were normal. All muscles examined were normal in tone and size.

Plaintiff's doctor was frank to admit that he could not find a single objective symptom which would account for the subjective symptoms of pain and tenderness complained of by plaintiff except possibly the osteoarthritic condition which was not traumatic in origin.

Although the plaintiff had been examined by many doctors, as herein indicated, defendant called only three. These were Dr. Fuller of Salida, and Doctors Delahanty and Newman of Denver. Dr. Fuller examined the plaintiff at the Salida Hospital when he became a voluntary patient there in April, 1950, and examined and observed him during the course of his stay at that institution. While at the Hospital, plaintiff complained of pain in the right shoulder and back. Dr. Fuller could find no objective evidence which would in any way account for this pain. There was no evidence of swelling, bruises, or abrasions (Tr. 0077) (R. 70). On neurological test, all reflexes were normal and all tests negative. X-ray negatives failed to reveal any evidence of injury in the back or the shoulders (Tr. 0078) (R. 70-71).

Dr. Delahanty, whose specialty is psycho-neuro surgery, examined plaintiff both before and after his alleged injury. He made a complete neurological and functional examina-

tion of July 6, 1950. In this examination he found no limitation of motion. There was no wasting of any of the muscle groups, indicating that all muscles had been used normally. The Doctor made complete sensation tests and concluded that there was no organic basis in fact for any of plaintiff's symptoms of pain. From his examination the Doctor concluded that in his opinion plaintiff was greatly exaggerating symptoms of pain (Tr. 0090) (R. 82).

Dr. Newman, whose specialty is orthopedics, examined the patient as a consulting specialist in August, 1950. At that time he viewed a series of X-rays taken by some of the many doctors who had examined plaintiff; took additional X-ray negatives of his own and made a complete and detailed neurological and functional examination. In this examination the Doctor found that all reflexes were normal; muscles symmetrical and normal; and all sensational reactions normal (Tr. 0098) (R. 90-91).

Dr. Newman explained that when a part of the body is in pain it naturally protects itself by a minimal use and a spastic state which tends to splint or immobilize the parts effected. Such a condition is reflected in the muscle tone of the area. He found it significant that all of plaintiff's muscles in the shoulder, in the back, and in the legs, were normal in tone and size (Tr. 0103, 0104) (R. 93-94). In examining the plaintiff's shoulders, the Doctor noted that both were symmetrical, with equal muscle tone and development, indicating an equal use of each. Furthermore, he found that the "humero-scapular-rhythm" was normal. This, he explained, was the normal movement of the arm and shoulder, the significant fact being that a person with a painful shoulder moves the arm and shoulder and related joints with a different rhythm than that demonstrated in the normal shoulder, not involved with pain. He found

plaintiff's arm and shoulder motion normal (Tr. 0106) (R. 95).

Dr. Newman concluded from his examination that he could find no evidence that plaintiff had been injured. He did find, however, that the osteoarthritic condition in plaintiff's back could account for some pain. This condition was developmental and normal for persons of plaintiff's age and was not traumatic in origin. He also, like Dr. Holbrook, found a mild lumbo-sacro instability that was developmental and not traumatic and which could account for some tenderness and pain (Tr. 0109, 0110) (R. 97-99).

The jury returned a verdict for the plaintiff in the sum of $17,000. (Tr. 0007) (R. 6). Thereafter the defendant made motion for new trial (Tr. 0008) (R. 7). In support of this motion it filed the affidavit of Mrs. Cannon (Tr. 0010) (R. 8). At the request of the plaintiff, the foreman of the jury, Mr. Kay, also made an affidavit (Tr. 0011-0012) (R. 9-10).

These affidavits showed that the jury discussed an alleged offer of settlement in the Wheat case. Mrs. Cannon's affidavit recited: "Mention also was made by one of the jurors that he had heard that the Railroad Company had only offered the plaintiff $700 in settlement in this case." Mr. Kay's affidavit recited: "That during the deliberations of the jury mention was made of another verdict returned by a jury and of an offer of settlement *in the Wheat case.*"

The court requested that both Mrs. Cannon and Mr. Kay appear as witnesses at the time the motion for new trial was to be argued. At that time both witnesses further explained their affidavits with reference to the offer of settlement. Mrs. Cannon stated positively that, once in the jury box, before the jury had heard all the evidence and before it retired to deliberate upon its verdict, Mr. Kay, the Foreman of the jury, told her that the Railroad Company had

offered the plaintiff either $500 or $700 in settlement of the Wheat case (Tr. 0118, 0120) (R. 106, 107).

When Mr. Kay took the stand to testify, his affidavit had not been amended and still recited that mention had been made of an offer of settlement "*in the Wheat case.*" This affidavit had been prepared by counsel for the plaintiff after a telephone conversation with Mr. Kay. Following the telephone conversation, both counsel for the plaintiff who had participated at the trial appeared at Mr. Kay's home, read the affidavit to him, and he signed it as prepared. Nevertheless, upon taking the stand, he denied the correctness of the affidavit and stated under oath that neither he nor anyone else had made reference to a settlement in the Wheat case; that the settlement referred to was in some other railroad case (Tr. 0127) (R. 115). Before Mr. Kay testified, plaintiff's counsel moved to amend the affidavit which they had prepared and which Mr. Kay had signed by omitting the words "in the Wheat case" and substituting in their place "in the case" (Tr. 0116) (R. 104).

On cross-examination defendant's counsel asked Mr. Kay if he had not, prior to the time he changed his testimony relative to his affidavit, discussed the affidavit with both Mr. Ashton and Mr. McCarthy, counsel for the Railroad, and that in that discussion he had failed to deny that the reference to a settlement offer referred to the Wheat case. In answer to those questions Mr. Kay denied he had so conducted himself (Tr. 0127) (R. 115), whereupon, Mr. Ashton, one of counsel for the defendant, requested permission to take the stand. He testified that both he and Mr. McCarthy were present during a discussion with Mr. Kay and that in this discussion Mr. Kay admitted the reference in his affidavit to a settlement in the Wheat case but simply denied that the discussion of the settlement had anything to do with the jury's decision (Tr. 0128) (R. 116).

Following argument on the motion for new trial the Honorable Joseph G. Jeppson said:

> "Let the record show that the motion for a new trial has been argued by both sides. The Court is of the opinion that there was sufficient evidence of injury to go to the jury, *but it is of the opinion that the amount, $17,000, is excessive, and that the amount of $17,000 is evidence of both passion and bias and prejudice.* The defendant's motion for a new trial is granted, if the plaintiff does not in writing consent to a reduction of the verdict from $17,000 to $10,000 on or before March 3, 1952" (Tr. 0138) (R. 126). (Italics added.)

On the 3rd day of March, 1952, the plaintiff filed its acceptance of remittitur. It is from this remitted judgment that defendant takes this appeal.

Jurisdictional Statement

A. The Jurisdiction of this Court is invoked under Title 28, U.S.C.A. Section 1257, paragraph 3.

B. The judgment of the Supreme Court of Utah was entered June 8, 1953 (Tr. 0142) (R. 137).

C. The petition for Rehearing was denied June 8, 1953 (Tr. 0144) (R. 138).

D. This petition was filed September 5, 1953.

E. The statute of the United States applied by the Supreme Court of Utah is Title 45, U.S.C.A. Section 51.

Question Presented

The question presented is whether a verdict which the trial court found was "evidence of both passion and bias and prejudice" can be cured by remitting a part of the verdict.

Reasons Relied On for Allowance of Writ

As herein indicated, the trial court found the verdict was

excessive and that it indicated "both passion and bias and prejudice" (Tr. 0138) (R. 126). This Honorable Court has held that under the rule applicable to Federal Employers' Liability cases a verdict tainted with passion and prejudice is wholly bad. The taint cannot be removed by remitting part of the verdict. The controlling case so holding is *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Moquin*, 51 S. Ct. 501, 283 U. S. 520.

That case originated in Minnesota under the Federal Employers' Liability Act. The jury returned a verdict for plaintiff in the sum of $27,500. The case was appealed to the Supreme Court of Minnesota. (181 Minn. 626, 231 N. W. 829). That court after reviewing the record concluded that the verdict was excessive and that its excessiveness indicated passion and prejudice. The Minnesota Court said:

> "The verdict was $27,500. From the entire record before us we are of the opinion that *the* verdict is excessive because of passion and prejudice. A new trial is granted unless plaintiff shall, within fifteen days after the filing of the remittitur in the district court, file a written consent to a reduction of the verdict to $22,500, in which even the verdict so reduced shall stand." (page 833). (Italics ours.)

Following this decision the plaintiff accepted the remitted amount and judgment was entered. From this judgment the Railroad again appealed to the Minnesota State Supreme Court where the judgment was sustained. 181 Minn. 626, 231 N. W. 920. The defendant Railroad thereupon obtained a writ of certiorari to the Supreme Court of Minnesota. 282 U. S. 833, 51 S. Ct. 105. This Honorable Court in an opinion written by Justice Roberts, held:

> "A new trial was ordered, unless the respondent should file in the trial court a writing remitting a portion of the verdict. 181 Minn. 56, 231 N. W. 829, 832.

Such a remittitur was filed, and thereupon the trial court entered judgment for the remainder. The *petitioner again appealed* and the Supreme Court affirmed, 181 Minn. 626, 231 N. W. 920, merely referring to its previous opinion. We granted a writ of certiorari 282 U. S. 833, 51 S. Ct. 105, 75 L. Ed. . . ., limited to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-59) where the verdict was obtained by appeals to passion and prejudice.

"It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. *Nor need we inquire into the rules applicable in trials under state law.* Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

"In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." (Italics ours).

It is appellant's position that the *Moquin* case, *supra*, is the controlling law in the case at bar. It has been followed and cited with approval in the following cases arising under the Federal Employers' Liability Act:

Jones v. *Pennsylvania R. Co.* (1944), 353 Mo. 163, 182 S. W. 2d 157;

Larsen v. *Chicago & N. W. R. Co.* (1948), 171 F. 2d 841;

Hayes v. *N. Y. Central R. Co.* (1946), 328 Ill. App., 631, 67 N. E. 2d 215.

Other federal cases which hold that the court must grant a new trial where a verdict is excessive because of passion and prejudice are:

Brabham v. *State of Mississippi*, 5 Cir., 96 F. 2d 210;
Paf Mfg. Co. v. *Polk Co.*, 8 Cir., 72 F. 2d 33;
Detroit Taxicab Co. v. *Pratt*, 6 Cir. 2 F. 2d 193;
United States v. *Certain Parcels of Land in Rapides Parish, La.*, 5 Cir., 149 F. 2d 81;
Houston Coca-Cola Bottling Co., v. *Kelley*, 5 Cir., 131 F. 2d 627;
Southern Pac. Co. v. *Guthrie*, 9 Cir., 180 F. 2d 295.

It is Petitioner's position that The Supreme Court of Utah, in the instant case, nullified the ruling of the *Moquin* case by a sort of confession and avoidance. While the Court seemingly admitted that the *Moquin* case is controlling, it avoided the effect of the decision by holding that the oral decision of the court that "the amount of $17,000 is evidence of both passion and bias and prejudice," was apparently a mere gratuitous remark which was of no legal effect. The court then referred to the minute entry which is as follows:

> "The Court finds that the amount of judgment rendered of $17,000 to be excessive and that judgment be reduced to $10,000 on or before March 3, 1952. If judgment is not accepted by the above mentioned date, then defendant is granted a new trial." (Tr. 0139) (R. 129).

This minute entry, the Utah Supreme Court held, nullified the oral decision of the trial court. To support this contention the Honorable Justice who wrote the opinion cited cases wherein the Utah court had held that oral statements of the trial court inconsistent with the findings and conclusions ultimately rendered did not affect the final jugment (Tr. 0139) (R. 129). (*Stevens & Wallis* v. *Golden Porphry Mines Co.*, 81 Utah 414, 18 P. 2d 903, and *McCollum* v. *Clothier*, — Utah —, 241 P. 2d 468.

Neither of these cases is applicable. Certainly oral statements of a court inconsistent with subsequent formal findings of fact and conclusions of law would have no legal effect. It is another matter however to hold that a consistent minute entry entered by a clerk nullifies the oral decision which the court made in directing the entry of the order. We respectfully submit that the clerk's minute entry reciting the ultimate effect of the order cannot properly nullify the court's reasons for making the order.

It is uniformly held that a docket entry is not a part of the judicial proceeding, and that the entry of a judgment by the clerk on the records of the court is a ministerial and not a judicial act. *Puckett* v. *Guenther*, 142 Iowa 35, 120 N.W. 123, *Re Cook*, 77 Cal. 220, 17 P. 923, 19 P. 431.

The law in Utah in respect to the question here presented is now, we believe, completely confusing. Whereas this Honorable Court has clearly held that a verdict in any degree tainted with passion or prejudice is wholly bad, the Utah court refuses to so hold. In *Duffy* v. *Union Pacific Railroad Co.*, decided by the Supreme Court of Utah May 17, 1950 — Utah —; 218 P. 2d 1080, plaintiff brought action in the state court under the Federal Employers' Liability Act. The jury returned a verdict of $12,500 and deducted $3,000 for contributory negligence. The Railroad appealed on the ground that the trial court abused its discretion in not granting a new trial because the amount awarded was so grossly excessive that it appeared to have been arrived at because of passion and prejudice. The Supreme Court of the State of Utah ruled directly *contra* to the *Moquin* case, *supra*, and in an opinion written by Justice Lattimer held:

> ". . . A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against that of the jury, but usurps judicial power and prostitutes the constitutional trial by jury. Still the

jury cannot be permitted to go unbridled and unchecked. Hence the Code that a new trial on motion of the aggrieved party may be granted by the court below on the ground of 'excessive damages appearing to have been given under the influence of passion, or prejudice.' Whenever that is made to appear, the court, when its action is properly invoked, should require a remission or set the verdict aside and grant a new trial. But, before the court is justified to do that, it should clearly be made to appear that the jury totally mistook or disregarded the rules of law by which the damages were to be regulated, or wholly misconceived or disregarded all the evidence, and by so doing committed gross and palpable error by rendering a verdict so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice. Whether a new trial should or should not be granted on this ground, of necessity, must largely rest within the sound discretion of the trial court."

The Court then held:

". . . we are, nevertheless, of the opinion in this case that the damages awarded by the jury have no foundation in fact, and *are so grossly excessive and exorbitant as to convince the members of this Court that the verdict is far in excess of what a reasonable jury could determine as the maximum awardable for this type of injury. For these reasons it appears to us to have been given under the influence of passion and prejudice.*" (See finding of Minnesota Supreme Court in *Moquin* case, *supra*).

and again:

"It is ordered that the judgment appealed from be reversed and a new trial granted, with costs to appellant, unless respondent shall, within 15 days from the date of filing of this opinion, file in this court a remittitur in the sum of $4,000 and accept a net verdict of $5,000; if such remittitur be filed, the judgment then to be modified in accordance therewith, and as so modified

affirmed with no award of costs on appeal to either party."

Justice Pratt dissented on the ground that a new trial should have been granted, which dissent is consistent with the *Moquin* case. Strangely enough the *Moquin* case was not even presented to the Utah Supreme Court in the *Duffy* case, *supra.*

In the case at bar the Court made reference to the *Duffy* case and said (Tr. 0140) (R. 130-131):

> "Later in the opinion [*Duffy* case] the court notes that the verdict appeared 'to have been given under the influence of passion and prejudice' and concluded that the trial court abused its discretion in not either granting a new trial or requesting a remittitur. *Accurately analyzed,* the view of the court in the above cases was undoubtedly that the award, while excessive, *was not so grossly excessive as to taint and make invalid the whole verdict."* (Italics added) (See finding of Supreme Court of Minnesota in *Moquin* case, *supra*).

It is difficult to understand this "now you see it now you don't" sort of reasoning. This Honorable Court clearly held that a finding of excessiveness on the simple basis of passion and prejudice is a sufficient finding to establish that fact and so nullify the entire verdict (*Moquin* case, supra). The Utah Court, however, in the instant case talks itself completely around the *Moquin* rule by holding that Justice Lattimer's finding in the *Duffy* case, *supra* (which incidently is a much stronger finding of passion and prejudice than the finding by the Minnesota Supreme Court in the *Moquin* case), *"accurately analyzed"* means that the "grossly excessive and exorbitant" verdict "given under the influence of passion and prejudice" in the *Duffy* case, was not so grossly excessive as to taint and make invalid the whole verdict" (Tr. 0140) (R. 130).

The *Duffy* case, as now interpreted by the Utah Supreme Court, holds that a verdict grossly excessive and exorbitant because of passion and prejudice is not ground for a new trial unless the reviewing court further finds that the passion and prejudice were so gross as to taint and make invalid the entire verdict. We submit that this is in effect a complete repudiation of the *Moquin* case.

After going this far it was relatively simple for the Utah Court to dispose of the instant case by simply holding that the trial court's finding of passion and bias and prejudice was a nullity because the court's decision was not included in the clerk's minute entry. The court might well have disposed of the instant case, as it did the *Duffy* case, by simply stating that the finding of excessiveness because of passion and prejudice was not so grossly expressed as to invalidate the whole verdict.

Strangely enough the Utah Supreme Court in the instant case reiterated a well established rule as follows:

> The trial court "is in a much better position [than we are] to observe and determine whether a jury was actuated by passion or prejudice, or by both, in returning a verdict for an amount larger than the evidence justifies, or whether the jury was merely mistaken with regard to the amount that should have been allowed."

The trial judge who saw the witnesses, including one of the jurors whose testimony was taken at the request of the Court, after accusations had been made concerning that juror's misconduct, held that $17,000 was excessive and that "the amount of $17,000 is evidence of both passion and bias and prejudice."

We submit that the judicial decision in the instant case and in the *Duffy* case are contrary to the letter and the spirit of *Minneapolis St. P. & S. S. M. Ry. Co.* v. *Moquin*, 51 S. Ct. 501, 283 U. S. 520. The Supreme Court of the State

of Utah has twice ignored the mandate of the United States Supreme Court on this subject. There is no reason to believe that this error will not be perpetuated in subsequent decisions. The necessity of a fair and uniform administration of the Federal Employers' Liability Act in this state requires a review of the present case and a reaffirmance by this Honorable Court of the rule heretofore, expressed in the above decision.

WHEREFORE, petitioner prays that the writ be granted.

DENNIS MCCARTHY,
CLIFFORD L. ASHTON,
Counsel for Petitioner.

VAN COTT, BAGLEY, CORNWALL &
MCCARTHY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 319

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

JOHN H. WHEAT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

(Numerals in parentheses refer to pages of the printed record and italics are ours.)

OPINION BELOW

The opinion of the Supreme Court of the State of Utah in this case appears at record 126. It has not yet been officially published but is reported in 250 P. 2d 932.

THE QUESTIONS PRESENTED

The petitioner asserts the question here presented is whether a verdict that the trial court found was "evidence of both passion and bias and prejudice" can be cured by

remitting a part of the verdict. This is an inaccurate statement of the questions involved. The fact of the matter is the trial court did not make a finding that the amount of the verdict indicated or established passion, bias or prejudice on the part of the jury and there were no appeals to either passion or prejudice. The further point is involved that the evidence does not support a finding that the amount of the verdict established bias or prejudice.

In opposition to the granting of the writ of certiorari, the respondent respectfully presents the following propositions:

I. The Utah courts did not find that the verdict resulted from passion or prejudice.

II. The Utah court did not find and there is no contention that the verdict was the result of appeals to passion and prejudice.

III. The evidence will not support a finding that the verdict resulted from passion or prejudice.

IV. The law announced by the Utah Supreme Court is in conformity with the law announced by the United States Supreme Court.

PRELIMINARY STATEMENT

The statement of the case in the petition is entirely inadequate and unfair. It does not present the evidence in the light most favorable to respondent as it must do. We will not make a separate statement of the facts but will narrate them under Point III where they become material to our contentions.

ARGUMENT

POINT I

THE UTAH COURTS DID NOT FIND THAT THE VERDICT RESULTED FROM PASSION OR PREJUDICE.

Petitioner bases its petition upon the false premise that the Utah courts found the verdict resulted from passion and prejudice. Therefore, this petition, founded upon a completely erroneous premise, fails.

As announced by the Utah Supreme Court, the law in Utah is that where a judge makes a formal written order, such order is controlling over any oral statements made by the judge and such oral statements do not constitute findings or judgments (128-130).

The trial court's written order, controlling as to the reason for the court's action in permitting a remittitur, is as follows (11):

> "The defendant's motion for a new trial comes now on for hearing before the Court, the plaintiff and defendant not appearing but represented by their counsel. Whereupon, Alethea Cannon, Albert Kay and Clifford Ashton are sworn and examined. The Court finds that the amount of judgment rendered of $17,000.00 to be excessive and that judgment be reduced to $10,000.00 on or before March 3, 1952. If judgment is not accepted by or before above mentioned date, then defendant is granted a new trial."

It thus appears from Utah law that the only grounds for permitting remittitur was that the verdict was considered excessive by the court and not because it resulted from passion or prejudice.

Petitioner's entire reliance is upon some oral statements made by the court at a time when the court was merely talking from the bench. These statements have no legal significance. Controlling is the considered order of the court which he put in writing and upon which he placed his signature. Petitioner refers to this minute order as the clerk's entry. This statement is misleading. A minute order under Utah practice, as the Utah Supreme Court points out in its opinion (129), is the court's order. It is a written order signed by the judge.

Even the oral statement of the court from the bench relied upon by petitioner is not a finding that there was passion and prejudice in the verdict. The court does not say that it clearly appears or that it was established that the verdict resulted from passion or prejudice in any degree. This oral statement merely is to the effect that the amount of the verdict "*is evidence* of both passion and bias and prejudice."

This Court has long recognized and clearly established in its decisions that the procedural or adjective law of a state in F.E.L.A. cases is controlling and that on procedural matters it will follow the state courts. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961; *Chesapeake & O.R. Co. v. DeAtley*, 241 U.S. 310, 36 S. Ct. 564, 60 L. Ed. 1016; *Brinkmeier v. Missouri Pacific Ry. Co.*, 224 U.S. 268, 32 S. Ct. 412, 56 L. Ed. 758; *Kansas City S. R. Co. v. Leslie*, 238 U.S. 599, 35 S. Ct. 844, 59 L. Ed. 1478; *Central Vermont R. Co. v. White*, 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1433; see also *Showalter v. Western R. Co.*, 16 Cal. 2d 460, 106 P. 2d 895 (former opinion 96 P. 2d 964).

The method or manner by which a finding is accomplished certainly is procedural. Under Utah law, a finding cannot be made by off-hand oral statements from the bench. The only method of making a finding is in writing. The trial court's formal written and signed minute order permitted remittitur only because of excessiveness and there was no finding or intimation that the verdict was tainted in any degree by passion or prejudice or that this latter was the ground of the court's ruling.

Concerning the trial court's formal written ruling, the Utah Supreme Court stated (130):

> "But where the ruling appears to be justified as a matter of law, expressions such as made by the trial judge in this case would not require a reversal of his action, his ruling being entitled to the presumption that it is correct."

This Court has announced a rule giving similar respect to rulings of a trial court appraising a jury's conduct in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439. It stated:

> "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

We submit the Utah courts have not found the verdict resulted in any degree from either passion or prejudice.

POINT II

THE UTAH COURT DID NOT FIND AND THERE IS NO CONTENTION THAT THE VERDICT WAS THE RESULT OF APPEALS TO PASSION AND PREJUDICE.

No contention was made in the Utah courts and it is not made here that any appeals to passion or prejudice were made by respondent or his counsel. The only possible support for a finding that the verdict was tainted by passion or prejudice would be the amount of the verdict. This Court did not hold in *Minneapolis, St. Paul & S. S. M. Ry. Co. v. Moquin,* 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, that in such a situation a new trial should be granted. This Court held that a verdict obtained by *appeals* to passion and prejudice cannot stand.

In the *Moquin case,* the Supreme Court of Minnesota had determined:

> "From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

That court criticized the misconduct of plaintiff's attorney in making appeals to passion and prejudice but held the error had not been properly raised on this question of misconduct. The court did, however, make the above finding. The writ of certiorari was granted upon a limited and particular ground. In the language of this Court, the writ was (p. 521):

> "* * * limited to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employer's Liability Act (45 U.S.C.A., Sections 51 to 59) where the verdict was obtained by *appeals* to passion and prejudice."

Hence, the only proposition considered was that plaintiff's counsel made an improper and prejudicial appeal to the jury and the verdict resulted from passion and prejudice so created. This Court expressly limited its holding to the ground upon which the writ was granted and stated (p. 521):

> "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of *appeals* to passion and prejudice. Obviously such *means* may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The Federal Courts considering the *Moquin* case have recognized this limited holding and have recognized this Court held that only where the verdict results from appeals to passion or prejudice is it necessary to set aside the entire verdict and order a new trial. *Larsen v. Chicago & N. W. R. Co.*, 171 F. 2d 841; *Southern Pacific Co. v. Guthrie*, 180 F. 2d 295, on re-hearing 186 F. 2d 926.

In the *Larsen* case, the court stated (p. 845):

> "The Supreme Court has repeatedly said that we may not review the action of a federal trial court in denying a motion for a new trial on the ground that the damages awarded by the jury were excessive. See cases cited in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481, 485, 53 S. Ct. 252, 77 L. Ed. 439. True it is, that a verdict obtained by appeals to passion and prejudice cannot stand. Minneapolis, St. P. & S. S. M. Ry. v. Moquin, 283 U.S. 520, 53 S. Ct. 501, 75 L. Ed. 1243. But that is not our case. Here there was no misconduct of plaintiff's counsel in making appeals to passion and prejudice, hence we have no authority to tamper with the jury's verdict, or as Mr. Justice Holmes said in Texas & Pacific Ry. v. Behymer, 189 U.S. 468, 469, 23 S. Ct. 622, 47 L. Ed. 905, 'we have nothing to do with that.'"

The record in the present case is entirely devoid of any improper or prejudicial conduct on the part of respondent

or his counsel which would in any way induce the jury to return a verdict which would not reflect justice between the parties.

Many cases hold that passion and prejudice cannot be inferred from excessiveness alone. See *Flener v. Louisville & N. R. Co.*, 198 F. 2d 77, where the court stated:

> "Passion and prejudice of the jury will not be inferred from the mere excessiveness of the award."

We submit that only in the event the record discloses some misconduct which would result in passion or prejudice can the *Moquin* case be held applicable to the case at bar, and the record here discloses nothing of the kind.

POINT III

THE EVIDENCE WILL NOT SUPPORT A FINDING THAT THE VERDICT RESULTED FROM PASSION AND PREJUDICE.

Respondent does not concede there was any finding of passion or prejudice or appeals to passion or prejudice. Desiring to present all matters in opposition to the petition, respondent asserts under this point that the evidence of permanent injuries suffered by him supports the assessment of damages made by the jury and absolutely excludes any support for a finding that the verdict was induced or tainted by passion or prejudice. The concurrence of Chief Justice Wolfe of the Utah Supreme Court was expressly upon this ground (136).

The courts generally, and in Utah, have held that before the amount of the verdict could be said to show passion and prejudice, it must be so grossly excessive and dispro-

portionate to the injuries as to shock the conscience and show passion, prejudice and corruption of the jury. *Pauly v. McCarthy,* 109 Utah 431, 184 P. 2d 123; *Geary v. Cain,* 69 Utah 340, 255 P. 416; *Eleganti v. Standard Coal Co.,* 50 Utah 585, 168 P. 266; *Duffy v. Union Pacific R. Co.* (Utah), 218 P. 2d 1080.

Plaintiff contends the amount of the verdict here was supported by the evidence thereby excluding any passion or prejudice. A consideration of the evidence discloses that plaintiff received painful and permanent injuries; that he was still suffering from them at the time of the trial (one year and nine months after they were inflicted) and that there would probably be no further improvement in his condition. True it is, defendant contends the plaintiff was never hurt, but plaintiff's testimony, his constant quest for relief from doctors, the testimony of Dr. Holbrook, plaintiff's hospitalization, treatments and back brace adequately establish that plaintiff was in fact injured, and seriously so.

The evidence discloses that on March 11, 1950, while plaintiff was in the act of placing coal in the tender of an engine, the cable on the 800 pound (30) coal chute broke causing plaintiff, who had hold of the chute, to be driven into the coal of the tender on which he was standing and jackknifing his body, thereby causing injuries to his right shoulder, left leg, back and elbow (12-17). The injuries so suffered kept him from working from April 5, 1950 until December 25, 1950 (23). Plaintiff had an earning capacity of $400.00 per month resulting in an actual wage loss of $3,460.00 (12).

After his injuries, plaintiff finished the shift (19) and continued to work from March 11, 1950 to April 5, 1950 (20).

During this time he could not perform his full duties, he needed help and he transferred to a job which required less physical activity and kept him off his feet (20). Finally, on April 5, when he was required to work on a hand-fired steam engine, he "got to feeling so bad I couldn't finish the shift" (20). On the 6th day of April, 1950, he reported to a hospital at Salida, Colorado, and after examination by doctors, he was put to bed on a fracture board. His left leg was placed in traction and he was given heat treatments. He remained in the hospital until May 13, a period of thirty-seven days (21). The doctors diagnosed his condition as a sprain of the right rhomboid group consisting of the extensor muscles of the back on the dorsal and lumbar spine (74). When he left the hospital, he returned to his home but he felt no better (23). He returned to the hospital on May 22 for three days and again returned to his home (23). While he was at home, he continued giving himself treatments such as hot baths. He could stay up for approximately three hours each day. He noticed some improvement in his condition. He suffered less pain in his shoulder but he still had numbness in his legs (23, 24). Finally, because of his financial condition, he returned to work. As he expressed it, "I would say financially it was necessary to go back to work whether I felt like it or not" (24, 64). A metal back brace had been prescribed for him which he wore constantly until September of 1950. He then commenced to wear it on alternate days (24-25). He returned to work as a fireman in the Pueblo yards on December 25, 1950 (24). From that time until trial, he had attempted to perform his duties but he continued to suffer pain and any exertion would aggravate his condition (25). He described his condition at the time of trial as follows (25):

"The pain has never left in the region of the right shoulder blade there. Around, you might say, in the region of the vertebrae and the breastbone here gave me some pain, and the region at the rib, close up here in front, is still tender, and that standing pain goes clear back to the back of the rib where it is fastened to the backbone. I still have a numbness in the feet, like I say, when I get in a certain position or get to lifting, and than it really tickles. That is, it is just like electric shocks going through you, and it hurts me to lay flat on a table, like that table there, to lay flat on the back. It is hard for anybody to understand anything like this that has never had pain."

During this period, plaintiff saw seventeen doctors (26, 27). This is certainly strong evidence that he was suffering from injuries; that he was seeking relief from pain.

Prior to March of 1950, plaintiff had enjoyed good health (27). He had been injured in 1940 and 1943, but these injuries were not of a serious nature and he had entirely recovered from them prior to the injuries involved in the case at bar (28-29).

Dr. Boyd Holbrook examined plaintiff on November 14, 1950 and December 4, 1951. In his first examination, he found that plaintiff had pain, tenderness and limitation of motion in his neck and lower back, and tenderness over the left front lower chest (41-44). X-rays disclosed that he had a mild arthritis in the dorsal spine and there was a moderate narrowing of the joint in his lower back (42). This condition in his lower back made him more subject to injury (43). The doctor was unable to tell exactly what caused this condition, but he limited it to three causes: (1) congenital; (2) wear and tear; (3) injury (44).

From the evidence, the plaintiff had not been bothered by his back prior to March 11, 1950 and had continuously from that date suffered from the pain in his lower back. The trier of the fact could reasonably find that the condition in his back had been caused by the injury of March 11.

This doctor also testified that an injury such as he described would have aggravated the condition in his back. At the examination of December 4, 1951, the doctor found there was still tenderness in the lumbar-sacral region. There was stiffness in the back muscles. On forward bending, respondent's muscles pulled him to the left. There was limitation in bending to the right indicating muscle spasm on the left which prevented full range of motion. There was still tenderness in lower anterior rib region and in the upper part of the back. There was limitation of motion in his right leg (45). The prognosis given by the doctor was as follows (45):

> "Well, of course, it is difficult for one to say in a particular given case what the prognosis will be. We know that they can get worse or they can get better, or they can stay about the same. It would be my opinion that since Mr. Wheat has apparently improved up to a point and then stopped improving, that he has probably reached, for all practical purposes, his maximum improvement, and that with the x-ray findings of this last joint in his back not being normal that one would expect he would continue to have some disability."

Petitioner's attempt before the jury to establish that respondent was a malingerer failed miserably. The jurors' evident finding that plaintiff sustained serious injuries which would continue the rest of his life is amply supported by the foregoing and by the finding of Dr. Holbrook expressed as follows (52):

"I found no evidence to indicate that Mr. Wheat was not having the complaints or the pain that he complained of, and there were no findings that were contradictory in the examination. The findings appeared to me to substantiate the complaints."

It needs no citation of authority to establish that respondent was entitled to recover for lost wages, impaired earning capacity, past and future mental and physical pain and loss of bodily function.

The verdict, when compared with the injuries and damage suffered by respondent, neither shocks one's conscience nor establishes passion or prejudice on the part of the jury. The jury could reasonably find that his lost wages amounted to $3,460.00, that he had experienced mental and physical pain and suffering in the past, that he would continue to suffer from his injuries the rest of his life (he was 47 years of age at the time of trial) and that this pain and suffering would, as it had done, curtail his physical activity and limit him in his job selection thereby impairing his earning capacity.

We submit that there is no support in the evidence for any finding that the jury was prompted by passion or prejudice in returning a verdict for $17,000.00 as compensation for the permanent injuries suffered by respondent.

POINT IV

THE LAW ANNOUNCED BY THE UTAH SUPREME COURT IS IN CONFORMITY WITH THE LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT.

Petitioner makes the contention that the Utah Supreme Court by its opinion in the case at bar and its opinion in *Duffy v. Union Pacific R. Co.*, 218 P. 2d 1080, has com-

pletely confused the law of Utah and that these decisions are contrary to the Federal law on this subject. Nothing could be further from the fact and petitioner's contention in this regard is completely refuted by the following quotations from the opinion of the Supreme Court in the case at bar:

> "We do not doubt that when a verdict is so grossly disproportionate to any amount of damages which could have fairly been awarded as to make manifest that the verdict was so suffused with passion and prejudice that the defendant could not have had a fair trial on the issues, the trial court should unconditionally grant a new trial." (first paragraph, record 130).
>
> "Notwithstanding what was said therein (referring to the Duffy case) we regard the true rule to be that if the verdict is so excessive as to show that it must have been motivated by prejudice or ill will toward a litigant, or that passion such as anger, resentment, indignation or some kindred emotion has so overcome or distorted the jury's reason that the verdict is vindictive, vengeful or punitive, it should be unconditionally set aside." (first paragraph, record 131).

The Utah court in considering its pronouncement in the *Duffy* case was not exactly content with the language it had used. It placed its interpretation upon the case as follows (130, 131):

> "Accurately analyzed, the view of the court in the above cases was undoubtedly that the award, while excessive, was not so grossly excessive as to taint and make invalid the whole verdict."

We respectfully submit that petitioner's overzealousness for a writ has colored its interpretation of the law in Utah. However, the law as above set forth in the opinion in the case at bar and which is the latest pronouncement of

the Supreme Court of the State of Utah, clearly and accurately states the law and it is in accordance with the pronouncement of this Court in the *Moquin* case.

CONCLUSION

Petitioner has seen fit to place in the record and make comments concerning its abortive attempt to establish misconduct on the part of the jury. Reference to the testimony of the jurors has no application to the proposition presented by petitioner to this Court. It is merely an effort on the part of petitioner to attempt to get something before this Court which is not properly here. Nothing need be said concerning this alleged charge of misconduct other than what was said by the Supreme Court of the State of Utah in its opinion commencing at page 133 of the record. Petitioner did not even come close to showing misconduct.

We respectfully submit that under the foregoing arguments and authorities, the verdict returned by the jury was not tainted by passion or prejudice and under the record it could not possibly have been so tainted. The law as announced by the Utah Supreme Court in F.E.L.A. cases is in accordance with the Federal law and that court recognizes that such law is controlling.

We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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